UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

FULL-FILL INDUSTRIES, LLC

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 538

Cases 25-CA-249830
25-CA-251056
25-CA-251084
25-CA-252037
25-CA-253355
25-CA-256552
25-CA-271164
25-CA-275720
25-CA-279712

Derek A. Johnson, Esq., for the General Counsel.
John E. Thies, and Michael J. Brusatte, Esqs., (Webber & Thies, P.C., Urbana, Illinois and David B. Wesner, Esq., Evans Froehlich, Beth & Chamley, Champaign Illinois) for the Respondent.
Sue D. Gunter, and Natalie C. Moffett, Esqs., (Sherman, Dunn, Cohen, Leifer, Washington, D.C.), for the Charging Party.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried via Zoom virtual technology on November 15-17 and 29, 2021. The Charging Party Union filed its first charge on October 10, 2019. and the General Counsel issued the most recent consolidated complaint on October 13, 2021.

The essence of this case is as follows: On December 26, 2019, the Board certified the Charging Party Union, IBEW Local 538, as the exclusive bargaining representative of a unit of Full-Fill employees.[1][2] On December 31, 2020 only a few days after the certification year had expired, Respondent Full-Fill informed unit employees that it was withdrawing recognition of the Union. It did not so inform the Union until about January 11, 2021, although an anti-union employee dropped off a decertification petition at the union hall on December 31, 2020.[3] Full-Fill withdrew recognition on the basis of this employee petition. The General Counsel alleges that Respondent cannot legally rely on this petition to withdraw recognition from the Union. The General Counsel argues that the petition is tainted by Respondent's unfair labor practices and does not even establish that the Union lost majority support in December 2020. Moreover, many signatures were obtained during the Union's certification year and thus cannot be relied upon to withdraw recognition. I agree with all these points.

The General Counsel alleges also that Respondent committed a number of violations of Sections 8(a)(1), (3) and (5) both before and after the withdrawal of recognition. These include delaying a XMAS or end of year bonus that had become an established past practice and discharging 2 pro-union employees. I find that Respondent violated the Act as alleged in many of these instances as well.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and Charging Party Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a limited liability company, manufactures and sells aerosol and pump cooking sprays and oils from its facility in Henning, Illinois. It supplies its products under contract to large food industry companies, most notably Con-Agra. It annually purchases and receives goods at this facility valued in excess of $50,000 directly from points outside of Illinois. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, Local 538 of the IBEW, is a labor organization within the meaning of Section 2(5) of the Act.

[1] The certified bargaining unit consists of all full-time and regular part-time production and compounding employees, forklift operators, maintenance employees, laboratory technicians, gas house operator, quality assurance, sanitation/janitorial employees and warehouse employees employed by Full-Fill at its main facility in Henning, Illinois and a warehouse in Rossville, Illinois.

[2] Respondent closed the Rossville warehouse in 2021. Employees who worked there transferred to a new warehouse at the Henning site. Henning is not far from Danville, Illinois.

[3] This may have occurred on December 30, rather than December 31, 2020.

II. ALLEGED UNFAIR LABOR PRACTICES

Complaint paragraph 5(a)-surveillance

The Union began an organizing drive at Respondent's facility in the summer of 2019. On or about September 4, 2019 a number of union representatives distributed handbills to Full-Fill employees as they left the first shift or arrived for the second shift at the Henning plant. The union representatives stood at the top of the driveway that leads from the employee parking lot to a public street. They may or may not have stepped onto Respondent's property at times.

Brian Clapp, Respondent's plant manager, testified that he approached the union representatives and told them not to come onto company property. If he did so, they complied. He also told them to stay out of the middle of the driveway, a request that would have made it impossible for the Union to disseminate its messages if it had complied with it. Clapp remained a short distance from the union representatives and the arriving and departing employees for at least 20 minutes. At one point, he took out his cellphone and held it in his hand.

Brian Clapp testified that he went out to observe the hand billing on one occasion in September 2019 because he had received complaints from employees about traffic safety. I do not credit this testimony. Clapp did not identify the employee who complained and there is no documentation to corroborate his testimony. There is also no evidence that anyone from Respondent called law enforcement authorities about the alleged safety issues.

Employee Donnie Whitlow testified about traffic safety concerns that allegedly occurred when the Union was hand billing. However, Whitlow testified about conditions a month or two after the incident in which Brian Clapp watched the union representatives handbill employees. Clapp's surveillance of employees' union activities is also consistent with Respondent's other unfair labor practices.

Complaint paragraphs 5 (b), (c) and (d)-surveillance of George Halls' union activities, creating the impression of surveillance, destruction of union literature, threat to search locker

Complaint paragraph 6(b) and (g)-search of George Halls' toolbox

George Halls, a maintenance employee who worked in the gas house,[4] was known to be a union supporter by Respondent. He testified that one of his leadmen, Rock Delp, told him in October 2019 that management had noticed him on a surveillance camera carrying folders of papers into the gas house. Shortly thereafter, Halls noticed that union literature that he had placed in the employee breakroom had been ripped up. I find there is insufficient evidence as to who destroyed this literature to find that this constitutes an unfair labor practice.

[4] Flammable gasses which are placed in sealed containers are stored in the gas house, a structure that is separate from the main facility.

On about October 30 or 31, 2019, Brian Clapp, the plant manager, and Richard Simpson, the maintenance manager, approached Halls at his workstation in the gas house. They proceeded to search his toolbox and told Halls they were going to search his locker in the breakroom.

Brian Clapp testified that this search was conducted randomly as part of an auditing/quality control procedure. The record, however, proves otherwise. There is no evidence that the search was conducted other than for discriminatory reasons. There is, for example, no evidence that Respondent searched any other employee's toolbox the same day, or that Respondent had any reason to search Halls' toolbox other than it suspected it contained union literature. Respondent singled out Halls because it suspected he had union literature in his toolbox and locker.

The testimony of lead mechanic Rock Delp corroborates Hall's testimony. Delp testified that someone told him that Halls may have some papers in the Gas House that he shouldn't have there. Delp testified that he followed up by telling Halls he shouldn't have non-work-related papers in the Gas House. Delp did not testify as to whom else in management he shared his information about the papers. I infer that Brian Clapp and Richard Simpson searched Halls' toolbox either as a result of information they obtained from Delp or from other persons.

Complaint 5(b) creation of the impression of surveillance by Rock Delp

Halls testified that leadman Delp told him he'd been seen on camera and that he should not do union business in the gas house.[5] Delp denies this. I credit Halls due to what I consider Delp's evasiveness as to what caused him to broach this subject to Halls. Delp's testimony that there are no cameras in the gas house does not contradict Halls. Halls' testimony indicates Delp told him that he been seen on camera before entering the gas house.

I also discredit Delp's testimony indicating that Respondent was concerned that the papers Halls had were flammable. The work-related papers that Respondent kept in the Gas House were just as flammable. I conclude that the search was performed because Respondent suspected that Halls had union-related material in his toolbox and possibly in his locker. I also conclude that Delp's comments were made to let Halls know that his union activity was being watched by management.

I dismiss complaint paragraph 5(c) which alleges that warehouse manager Jesse Gonzalez destroyed union literature in the presence of employees. The only evidence to support this allegation is George Halls' hearsay testimony as to what another rank-and-file employee told him as to who destroyed the union material in the employee breakroom.

Complaint paragraph 6(a) and (g)-Termination of Ricky Johnson

On September 19, 2019, Respondent discharged Ricky Johnson, a forklift operator, who had worked for Full-Fill for 6 years. On the day prior, Johnson had gone to the office of human

[5] Respondent admits that Delp is a statutory supervisor but denies he is Respondent's agent. I find that Delp was Respondent's agent for the same reasons discussed herein with regard to leadpersons Karen Miller and Nancy Jones.

resources manager Lynn Mollica and had an emotional outburst. He had similar outbursts before and had been disciplined for them twice, 5 and 6 years earlier, R. Exh. 10(c), pg. 1. On the other hand, in 2018, Mollica talked Johnson out of quitting during such an outburst. She testified that Johnson was a good employee, had a good attendance record and that Full-Fill needed forklift operators.

Respondent contends Johnson was discharged for creating a hostile work environment. I do not credit Respondent's hearsay evidence that anyone thought Johnson might attack them physically or that he made a threat to harm anyone physically. If Respondent wanted to establish that Johnson was potentially violent or had made a physical threat, it should have called witnesses who supposedly had first-hand knowledge of such matters, such as Brandon Clapp, the plant manager's son.

The General Counsel contends that Respondent would not have fired Johnson but for his union activities, which included distributing union authorization cards in the employee breakroom shortly before he was fired. Respondent had a surveillance camera in the breakroom. Johnson's testimony that plant manager Brian Clapp observed him taking a union flyer as he left work on or about September 4, 2019 is uncontroverted. Prior to his termination Full-Fill had not disciplined Johnson since 2014.

Respondent's rules of conduct appear at page 22 of its employee handbook, R. Exh. 1. Its progressive discipline policy is found at page 25 of the handbook under the heading discipline and grievance. It states in pertinent part:

> Full -Fill Industries has a progressive disciplinary policy. (Do not forget, you are an "AT WILL" employee subject to dismissal at any time. The progressive disciplinary policy is not a right, but it is a prerogative of Full-Fill Industries management.) Full Fill Industries retains the right to use our discretion for any disciplinary issues, on a case-by-case basis.

By the terms of this policy and by its practice, Respondent does not have any objective criteria or standards according to which an employee is disciplined or terminated. It determines the level of discipline by whim. In applying its disciplinary policies, Respondent has been consistently inconsistent. E.g., G.C. Exhs. 9, 10, 11, 12: Union Exh. 9. Thus, it has not established that it would have discharged Rick Johnson in the absence of its animus towards his union activity.

Complaint paragraphs 6(c), (d) and (g)-discipline and discharge of Justin Kindle

At 11:53 a.m. on November 15, 2019, the Union faxed a letter to Lynn Mollica, then Respondent's human resources manager. The fax advised Mollica that Jason Kindle, a forklift driver working at Respondent's Rossville warehouse, was on the Union's organizing committee

and that he was trying to organize other employees. The letter was also sent to Respondent by certified mail and received shortly thereafter, G.C. Exh. 6. Kindle testified without contradiction that his lead, William Lowe, was aware of his support for the Union prior to November 15.[6]

Shortly after noon on November 15, 2019, Jess Gonzalez, Respondent's shipping and receiving or warehouse manager, who normally worked at the Henning location, came to Rossville. Gonzalez observed Kindle leaving the office at Rossville wearing his safety glasses on the top of his head. 15 minutes later, Kindle's lead, William Lowe handed Kindle a disciplinary write-up. Later that afternoon, Lowe gave Kindle a revised write-up threatening him with termination if he violated Respondent's safety glasses rule in the future. Kindle had a habit of not wearing his safety glasses properly or not at all.

On December 10, 2019, Kindle took a nap on his lunch break in a room next to the Rossville breakroom. Kindle napped often on his lunch break, Lead William Lowe was aware of this and had ordered Kindle not to nap in his forklift. Lowe was also aware that Kindle had been diagnosed with sleep apnea, because Kindle had to get permission to take off of work to undergo a sleep study.

Kindle overslept his lunch break by 30 minutes. William Lowe took a photograph of Kindle sleeping, R. Exh. 11(b) and did not try to wake him up. Lowe then sent the photo to plant manager Chris Steinbaugh. Respondent discharged Kindle that day for sleeping on the job.

Prior to his discharge, Kindle had been counseled for sleeping at work on other occasions, but had never been disciplined, Tr. 80. Respondent does not automatically terminate employees for sleeping on the job, G.C. Exh. 13, Union Exh. 11. Kindle also had been disciplined many times for other infractions such as insubordination and poor work quality. An example of the lack of consistency in Respondent's progressive discipline policy is that in August 2019, Respondent issued Kindle a written statement and final discussion for not working despite the fact that it had issued him a final warning and a written statement for insubordination in May 2019.

The lack of consistency in Respondent's application of its progressive discipline policy is also established by its treatment of other employees. For example, a team lead received a final warning in December 2015 and then was suspended for 1 day for similar conduct, Union Exh. 1. This team lead was terminated a few days later for another similar incident. Respondent has not contended that it was unaware of Kindle's union activities prior to disciplining him on November 15, 2019.

Complaint paragraph 8-refusal to accord George Halls a Weingarten representative

On or about February 13, 2020, George Halls was summoned to the office of Lynn Mollica, then Respondent's human resources manager. Chad Steinbaugh, Respondent's General Manager, was also present. Steinbaugh told Halls that he had been written up for cursing, i.e.,

[6] Lowe did not testify in this proceeding.

calling another employee, a "mother-fucker." Halls immediately asked that a union representative be present in the meeting. Lynn Mollica called the union hall, got no answer and left a message. Then she told Halls that he could make a written statement.

After that Lynn Mollica then handed Halls the write-up which had been prepared beforehand. However, no final decision was made to discipline Halls until after Respondent gave him the opportunity to make a written statement and after Mollica read his statement, Tr. .654-59.

Complaint paragraphs 5 (f), (g), (i) and 6(e) (g)-delay in issuing the XMAS/end-of- year bonus and statements made that there would not be one due to the Union; discontinuance of bonus for employees with less than 1-year service, part-time employees and temporary employees.

For at least 10 years prior to 2020, Respondent gave employees a XMAS/end-of-year bonus before December 25. While Respondent claims that employees received this bonus at a holiday party on December 24, the bonus was paid prior to December 20 between 2016 and 2019. In order to qualify for a bonus, an employee had to have worked at Full-Fill for one year. Employees with between 1 and 5 years' service received a week's pay as a bonus. Employees with more than 5 years' service received 2 weeks' pay. Employees with less than a year's service received $50 worth of gift cards.[7]

In 2020 Respondent did not have a holiday party due to the COVID-19 pandemic. Employees were not informed that they would be receiving a bonus until December 31. At the same time, they were informed that Full-Fill was withdrawing recognition from the Union.

The Union was not advised that the bonus would not be paid before XMAS or that employees would not be assured that there would be such a bonus. Prior to XMAS the only individuals who knew that a bonus would be paid the next week were CEO David Clapp, HR manager Mollica and payroll manager Karen Hayden.[8]

Pamela Holman, who worked for Full-Fill until April 2021, testified that prior to XMAS Day, leadperson Nancy Jones told her that employees would not be getting a bonus in 2020 due to the Union.[9]

[7] It is not clear whether new employees received the $50 bonus in 2020, or whether part-time employees who had received a bonus prior to 2020, received one in 2020. Due to this, I will order that any employee who was in a classification that received a bonus prior to 2020 and did not receive one in 2020 be paid the bonus as part of the remedy for Respondent's unfair labor practice.

[8] Clapp's testimony is that he had not definitely decided to pay a bonus until December 23. However, his testimony is inconsistent, and I hold that he made a decision to pay the bonus no later than December 22, 2020.

[9] Respondent objected to my allowing Holman to testify to what Jones said to her on hearsay grounds. First of all, Respondent admitted in its answer that Jones is a statutory supervisor. Although it denied that Jones is an agent, pursuant to Section 2(13) of the Act, Jones certainly is an agent if she made statements such as that testified to by Holman, *Mid-South Drywall,* 339 NLRB 480 (2003); *D&F Industries*, 339 NLRB 618, 619 (2003).

Chad Presswood, a current Full-Fill employee, testified that Jones told him prior to XMAS that she was not getting her bonus because of the Union.

Laurie Osborn, a current janitorial employee, testified that Jones said something similar to her about 2 weeks prior to XMAS.

Latisha Stubbs, who worked for Full-Fill until March 2021, testified that on about December 17, 2020, Karen Miller, a line lead, who Respondent admits was a statutory supervisor, asked Stubbs to watch her production line because all the supervisors were going to a meeting in an office. Stubbs saw Miller and supervisors Nancy Jones, Sarah Bitler[10] and Paul Engle enter the office of which she had a clear view. When Miller returned, she told Stubbs either that employees would not be getting their regular XMAS bonus because of the Union, or that Miller did not think employees were going to get their bonuses because of the Union.

Miller did not testify in this trial. Thus, Stubbs' testimony is uncontradicted. I therefore credit it. Although Miller no longer worked for Respondent at the time of the trial, Respondent did not state any reason as to why it did not call her as a witness. It could have, as other employers have done, subpoenaed a former supervisor.[11]

Stubbs testimony relates to paragraph 6(f) of the complaint. Thus, Respondent was on notice that it might need Ms. Miller's testimony to contradict evidence that would be elicited by the General Counsel.

Stubbs also testified that she overheard line lead/supervisor Nancy Jones telling other employees that they would not be getting a XMAS bonus due to the Union. Current employees, Chad Presswood and Lori Osbourn and former employee Pamela Holman also testified to similar statements made by Jones.

Jones denied ever being included in a meeting of supervisors and/or leads discussing whether bonuses would be issued in December 2020. She denied making the statements attributed to her by Chad Presswood, Lori Osborn and Pamela Holman or making statements that employees would not be getting the XMAS bonus within earshot of Latisha Stubbs. I credit the testimony of Presswood, Osborn, Holman and Stubbs on this point and discredit that of Jones. The testimony of Presswood and Osborn is particularly credible since they are current employees of Full-Fill and thus are vulnerable to retaliation for their testimony.[12] Stubbs' testimony regarding Jones is particularly credible because it is consistent with her uncontradicted testimony as to a similar statement by Karen Miller.[13] Also, I do not believe that Stubbs, Presswood, Holman and Osborn independently fabricated their testimony regarding Jones' statements.

[10] Mistranscribed as Bitner at Tr. 613.

[11] See, for example my recent decision in Quickway Transportation, 09-CA-251857, in which the employer called several former managers, which it had terminated, to testify in support of its case.

[12] The testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interest, *Flexsteel Industries,* 316 NLRB 745 (1995), enfd. mem. 83 F.3d 419 (5th Cir. 1996).

[13] I reject Respondent's attack on Stubbs' credibility. Full-Fill suggests Stubbs lied about the circumstances of the termination of her employment, Tr. 594-603. I find her departure is consistent with quitting. Although Respondent contends, she was fired for no call/no show, I find that Respondent did

Delay in payment of XMAS/end-of-year bonus; failure to inform employees or the Union about the delay.

No later than December 22, 2020 CEO David Clapp decided to pay employees a bonus, which for at least 10 years had been paid prior to XMAS, R. Exh. 7.[14] Respondent did not inform employees who would reasonably be expecting to receive the bonus before XMAS that they would receive it after XMAS. Respondent did not inform the Union either that the payment of bonuses would be delayed or that employees would receive the bonus after XMAS. At about the same time a decertification petition began to be circulated by Kenneth Jason Garrett. I infer this was not a coincidence and that the delay and the failure to let employees and the Union know that the bonus would be paid was done precisely to undermine support for the Union at the end of its certification year.

Complaint paragraph 6(e)-promises of benefits by Rock Delp

Latisha Stubbs testified that lead mechanic Rock Delp told her that her job would get better if employees voted the Union out. Delp denies this. I credit Ms. Stubbs but find that Delp's statements do not rise to the level of a violation of Section 8(a)(1) because this statement

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not prove that it ever informed Stubbs of that contention until the instant trial, Tr. 617-19.

[14]There is testimony that the bonus was generally paid at a XMAS party on December 24. However, that is not so for the years 2016-2019. G.C. Exhibit 29, a check register history, establishes that at least some, and maybe all employees were paid the bonus before that prior to 2020. In fact in the 4 prior years, they had been paid the bonus prior to December 21, the date on which the decertification petition began to circulate in 2020. This exhibit is somewhat difficult to find in the NxGen case file because it is not bookmarked. It can be found at pages 579-704 (Bates #s FF1000010 to 134) in the General Counsel exhibits uploaded on November 29, 2021. Although the General Counsel subpoenaed Respondent's records from 2009 to present, Respondent only produced its records from 2016 to present, Tr. 682-86.

Witness Lori Osborn received her bonus on December 15 in 2017, December 14 in 2018 and December 31 in 2020, G.C. Exh. 29, Bates # FF1000100. Witness Heather Self was paid her bonus on December 20 in 2019 and December 31 in 2020, Bates #116. James Kessner was paid his bonus on December 16 in 2016; December 15 in 2017; December 14 in 2018; December 20 in 2019 and December 31 in 2020. Justin Kindle was paid his XMAS bonus on December 15 in 2017 and December 14 in 2018. Susan Juvinall was paid the bonus on December 16 in 2016; December 15 in 2017; December 14 in 2018; December 20 in 2019 and December 31 in 2020, Bates # 72-73. Latisha Stubbs was paid her bonus on December 14 in 2018 and December 20 in 2019, Bates # 123, George Halls was paid his bonus on December 16 in 2016, December 15 in 2017, December 14 in 2018, and December 20 in 2019, Bates # 52-53. G.C. Exh. 29 is consistent with the testimony of Patricia Holman at Tr. 190, Lori Osborn at Tr. 339 and George Halls at Tr. 415.

The credibility of the General Counsel's witnesses regarding statements made by Karen Miller and Nancy Jones is supported by the fact that the payment of their bonuses were also significantly delayed in 2020 compared to prior years: Miller was paid her bonus on December 16 in 2016; December 15 in 2017; December 14 in 2018; December 20 in 2019 and December 31 in 2020, Bates # 91.

Nancy Jones was paid her bonus on December 16 in 2016, December 15 in 2017, December 14 in 2018, December 20 in 2019 and December 31, in 2020, G.C. 29, Bates # 68-69.

It is highly likely that Jones and Miller had discussions with other supervisors prior to December 24 as to why they had neither been paid their bonus nor received any indication that it was going to be paid.

by a low-level supervisor is not specific enough to constitute an illegal promise of benefits, *Coverall Rental Service,* 205 NLRB 880 (1973).

Complaint paragraph 9(d)-withdrawal of recognition

On December 31, employees found out for the first time that they were getting the bonus they had received consistently before XMAS in prior years. At the same time, they were notified that Respondent had withdrawn recognition from the Union, Tr. 250, 270, G.C. Exh. 29.

On December 31, 2020, Kenneth Jason Garrett, a rank-and-file forklift operator,[15] delivered a petition to the Union. The petition stated that if the signatories constituted at least 30% of the bargaining unit, that the NLRB should hold a decertification election. It also asked that if 50% or more of the unit signed the petition that Respondent withdraw recognition. The petition was circulated between December 21 and 30, 2020. The December 21 date is significant in that by December 20 in 2016, 2017, 2018 and 2019, many, most, or all employees who were entitled to a bonus had received one, G.C. Exh. 29.

34 of the employees who signed the petition, signed it before the expiration of the Union's certification year on December 25 or 26, 2020. All of the employees signed before they knew they were going to be paid the XMAS bonus, R. Exh. 3.

Dave Clapp, President and CEO of Respondent testified that he withdrew recognition of Local 538 on the basis of this petition. Clapp testified that he counted the signatures and determined that the number exceeded 50% of the bargaining unit. The petition contains 123 names, at least 3 of which are the signatures of individuals who were not members of the bargaining unit.[16] Clapp also did not testify as to how many employees were in the bargaining unit when he decided to withdraw recognition. He also did not testify as to any effort to determine the authenticity of the signatures.

Complaint paragraph 6(e) and (g)-unilateral increase in temporary employees doing bargaining unit work

Full-Fill has used temporary employees for years. Typically, it has employed 15-25 temporary employees. By July and August of 2021, about 60 temporary employees worked for Respondent at Henning, Tr. 507-08. Long before the union organizing drive, Full-Fill had service contracts with Trillium Staffing Solutions and Express Employment Professionals which provided these employees. The temporary staffing agency paid the employees a wage rate determined by Full-Fill and charged Full-Fill a fee. In some instances, Full-Fill was allowed to hire the employee directly; in others it was allowed to hire the employee after the lapse of a certain period. The temporary employees generally did the same work as bargaining unit employees; production work, shipping and receiving and operating forklifts. In March and April

[15] Several General Counsel witnesses referred to Mr. Garrett, as "Jason Garrett".

[16] Heather Simpson, the daughter of maintenance manager Richard Simpson, works at Full-Fill in the summer and on school breaks. R. Exh. 3 p. 9. The same is true of Emma Clapp, a relative of Dave Clapp. Lindsay Downing, R-Exh. 3, pg. 7, was a consultant to Respondent in December 2020 and had been the plant manager.

2021, Full-Fill dramatically increased the number of temporary employees at its Henning facility. Respondent no longer recognized the Union and thus did not notify the Union that it was going to hire additional temporary employees or offered to bargain about this.

On April 2, 2021, Full-Fill signed a service agreement with Strom Engineering Corporation, a temporary staffing company based in Minnetonka, Minnesota, with which it had not done business previously. Unlike Trillium and Express, Strom recruited employees nationwide and paid employees who were not local to Henning a per diem rate while they worked at Full-Fill.

Thereafter, Strom began providing Full-Fill with temporary employees such as machine operators and others to do bargaining unit work. The Strom employees were paid more than Full-Fill employees, but Full-Fill did not provide them with benefits such as health insurance, a 401(k) plan and holiday pay.

Complaint paragraph 9(a)-$1 per hour raise for carpooling with temporary employees.

On or about April 1, 2021, Respondent notified unit employees that they could earn $1 per hour extra if they were in a carpool with other employees. Full-Fill never had a similar program prior to April 2021. At this time, Respondent no longer recognized the Union and thus did not notify the Union of this program or offer to bargain over it.

ANALYSIS

Allegations relevant to the withdrawal of recognition

Respondent violated Section 8(a)(5) and (1) by delaying payment of its XMAS/end-of-year bonus.

This violation tainted its withdrawal of recognition from the Union.

Although Respondent's handbook states that bonuses are discretionary, its payment of a bonus equal to an employee's weekly salary[17]prior to XMAS was an established practice that was therefore a condition of employment which could not be altered without providing the Union notice and an opportunity to bargain over the delay.

Moreover, David Clapp decided to pay the bonus on December 22 and did not let employees know that they would get the bonus until December 31. This coupled with the circulation of the decertification petition starting on December 21, leads me to conclude that Respondent delayed paying the bonus and maintained silence about delay precisely to undermine support for the Union. The evidence of record overwhelmingly supports the inference that Respondent was successful and that but for the delay and its silence, not nearly as many employees would have signed the petition as did. Thus, even if the Respondent were otherwise entitled to rely on the petition to withdraw recognition, it cannot do so because withdrawal is

[17] 2 or 3 times that amount depending on the employee's length of service

tainted by this unfair labor practice. I thus find the delay to have violated Section 8(a)(3) and (1) and also Section 8(a)(5) and (1).

An employer's practices, even if not required by a collective-bargaining agreement, which are regular and long-standing, rather than random or intermittent, become terms and conditions of unit employees' employment, which cannot be altered without offering their collective-bargaining representative notice and an opportunity to bargain over the proposed change. *Sunoco, Inc.* 340 NLRB 240, 244 (2007); *Granite City Steel Co.*, 167 NLRB 310, 315 (1967); *Queen Mary Restaurants Corp. v. NLRB*, 560 F.2d 403, 408 (9th Cir. 1977); *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988); *B & D Plastics*, 302 NLRB 245 fn. 2 (1991); *DMI Distribution of Delaware*, 334 NLRB 409, 411 (2001). A practice need not be universal to constitute a term or condition of employment, as long as it is regular and longstanding. *Locomotive Fireman & Enginemen*, 168 NLRB 677, 679-680 (1967).

A past practice must occur with such regularity and frequency that employees could reasonably expect the "practice" to continue or reoccur on a regular and consistent basis. *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353-354 (2003); *Eugene Iovine. Inc.*, 328 NLRB 294, 297 (1999). In the instant case, there is no question that for more than 10 years, Respondent had paid employees a bonus equal to at least one week's pay just before XMAS and that employees had every reason to expect such a bonus before XMAS in 2020. It had also paid a bonus to employees with less than 1-years' service valued at $50.

Respondent, by Karen Miller and Nancy Jones violated Section 8(a)(1) in telling unit employees that they would not or might not receive their XMAS bonus due to the Union.

The statements of Jones and Miller are attributable to Respondent because they are agents of Full-Fill.[18] The test as to whether one is an agent of an employer is whether under all the circumstances employees would reasonably believe that the individual was reflecting company policy and speaking and acting for management. *Community Cash Stores,* 238 NLRB 265 (1978). *Mid-South Drywall,* 339 NLRB 480 (2003). I find that to be the case with the statements made by Jones and Miller. Employees received direction generally from the line leads that they were required to follow. Thus, rank and file employees would generally deem the line leads as reflecting company policy. Moreover, there would be no reason for a line lead to make these statements had they not been told as much by their superiors. Any rank-and-file employee would be likely to believe that Jones and Miller were repeating information that they had obtained from management persons above them.

Miller's status as an agent of Respondent is also enhanced by the uncontradicted testimony of Latisha Stubbs who saw Miller go into a supervisors' meeting just prior to telling Stubbs that employees would not be getting a bonus due to the Union.

Finally, the circumstances surrounding these statements enhances both the credibility of the General Counsel's witnesses and the agency status of the line leads. The statements were made at a time at which there was uncertainty as to whether employees would receive the XMAS

[18] While Respondent admitted that Jones and Miller were statutory supervisors, it denied that they were or are agents of Respondent.

end-of-year bonus they had received regularly for over 10 years. It is reasonable to assume that both rank and file employees and supervisors would be wondering why the company had been silent. It stands to reason that line leads like Miller and Jones would be curious as to the status of their 2020 bonuses and that they would pass information along to their subordinates-particularly if they were being told there would be no bonuses.[19] The credibility of the General Counsel's witnesses regarding statements made by Karen Miller and Nancy Jones is supported by the fact that the payment of their bonuses were also significantly delayed in 2020 compared to prior years: Miller was paid her bonus on December 16 in 2016; December 15 in 2017; December 14 in 2018; December 20 in 2019 and December 31 in 2020, G.C. Exh. 29, Bates # 91. Nancy Jones was paid her bonus on December 16 in 2016, December 15 in 2017, December 14 in 2018, December 20 in 2019 and December 31, in 2021, G.C. Exh. 29, Bates # 68-69.

It is highly likely that Jones and Miller had discussions with other supervisors prior to December 24 as to why they had neither been paid their bonus nor received any indication that it was going to be paid. That the employee testimony is consistent with what occurred also supports the agency status of Miller and Jones, *D&F Industries*, 339 NLRB 618, 619 (2003).

Withdrawal of Recognition

Section 8(a)(5) of the Act requires that an employer must recognize and bargain with the labor organization that its employees have properly chosen. Once a labor organization is recognized, it enjoys a continued presumption of majority support by employees. But when the union has been the collective-bargaining representative of the employees for over a year that presumption can be rebutted by the employer. The employer, which carries the burden of proof, must establish an actual loss of majority employee support before withdrawing recognition of a union. See *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 723 (2001) ("[A]n employer may not 'withdraw recognition unless it can prove that an incumbent union has, in fact, lost majority support").

Absent the preferred method of requesting the Board to conduct a representation election, an employer may choose at its peril to unilaterally withdraw recognition if presented with evidence of an asserted loss of majority support. See *Levitz,* supra at 725. If a union disputes the grounds for withdrawal of recognition, the employer must prove by a preponderance of the evidence "that the union had, in fact, lost majority support at the time [it] withdrew recognition." Id. The employer may only rely upon evidence that existed at the time of the withdrawal of recognition. Objective evidence relied upon by the employer when withdrawing recognition may include admissions by union officials that the union no longer has majority support and written and oral statements which clearly state that the bargaining unit employees do not want to be represented by the union. If the employer fails to meet its burden of proof, the withdrawal of recognition is a violation of Section 8(a)(5) and (1) of the Act.

[19] Even if Miller and Jones are not deemed agents of Respondent, hearsay testimony may be admissible in Board hearings and may be relied upon if particularly reliable, *Alvin J. Bart,* 236 NLRB 242 (1978). I find this to be the case with regard to the testimony of Stubbs, Chad Presswood, Lori Osborn and Pamela Holman.

Respondent has not met this evidentiary burden in the instant case. For starters, many (34) of the employees who signed the petition were solicited and signed the petition during the certification year. Thus, Respondent cannot rely on these signatures in withdrawing recognition. *Chelsea Industries, Inc.,* 331 NLRB 1648 (2000) enfd. 285 F.3d 1073 (D.C. Cir. 2002).[20] Secondly, there is no evidence that Respondent took any steps to determine that the signatures were authentic, *Latino Express, Inc.,* 360 NLRB 911, 913 (2014). It is also not clear whether David Clapp in determining that the Union has lost majority support relied on the signatures of individuals who were not members of the bargaining unit or how many employees were actually members of the bargaining unit.

Finally, the petition is tainted by Respondent's violation of Section 8(a)(5) and (1) in unilaterally delaying payment of the bonus and leaving at least some employees under the impression that they would not receive a XMAS/end-of-year bonus in 2020 due to the Union. See *Gas Machinery Co.,* 221 NLRB 862 (1975) [unilaterally withholding XMAS bonus violated Section 8(a)(5) and (1)]. Only a handful of people knew that the bonus would be paid in 2020 until December 31. Having received such a bonus prior to XMAS every year and having not received any information that it would be paid in 2020, it is reasonable that employees would wonder why this was so. It is also reasonable that they would discuss the lack of information. The initiation of the decertification petition no later than December 21, suggests that some employees, including supervisors, blamed the Union.

The Board considers four factors in determining whether a disaffection petition has been sufficiently tainted so as to prohibit an employer's reliance upon it: 1) the time period between the ULP and the withdrawal of recognition; 2) the nature of the ULP and its potential effect on unit members; 3) possible tendency to cause employee disaffection from the Union and 4) the effect on employee morale and in this case membership in the Union, *Master Slack Corp.,* 271 NLRB 78 (1978). Applying these factors to the instant case is one of several reasons that Respondent cannot legally rely on its employee petition, *RTP Company,* 334 NLRB 466, 468-69 (2001) enfd. 315 F. 3d 951 (8th Cir. 2003).[21]

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[20] *LTD Ceramics, Inc.* ,341 NLRB 86 (2004) relied upon by Respondent is distinguishable from the instant case in many respects. In *LTD* the Board allowed the employer to rely on employee signatures obtained on the last day of the certification year. However, unlike *LTD,* Full Fill withdrew recognition on the basis of a petition tainted by its unfair labor practice in delaying the end of the year bonus. There is a direct relationship between the petition, which began circulating the day after the date on which employees received their bonus in the prior 4 years and employee disaffection with the Union. Indeed, Full-Fill supervisors informed or suggested to employees that the Union was the reason that they may not get an end of the year bonus at all.

[21] *Quazite Corp.,* 323 NLRB 511 (1997) relied upon by Respondent is materially distinguishable. There the unfair labor practices relied upon by the General Counsel were either too remote from the withdrawal of recognition or were threats directed at 2 employees who were not working at the employer's facility. Thus, the Board found these threats were not disseminated to other employees. In the instant case, the delay in the payment of the bonus was not remote from the withdrawal of recognition. The dissemination by Respondent's supervisors and agents of the message that there might be no bonus was also not remote from withdrawal. Also, the record in this case establishes that these statements were made to employees other than those who testified at trial, e.g., Tr. 588-89. I would note that the *Quazite* decision predates the Board's decision in *Levitz* which changed the law and required an employer to prove a loss of majority status rather than relying on a good faith doubt of the union's majority status.

Finally, at page 24 of Respondent's brief, it states that an unremedied unfair labor practice cannot

Respondent violated Section 8(a)(5) and (1) in unilaterally and significantly increasing the number of temporary employees doing bargaining unit work and in offering employees an extra $1 per hour if they carpooled with temporary employees

It is uncontroverted that Respondent neither notified the Union nor offered it an opportunity to bargain over hiring significantly more temporary employees to do bargaining unit work or offering employees an extra $1 an hour if they carpooled with temporary employees. At the time it instituted these changes Respondent no longer recognized the Union. Since its withdrawal of recognition was illegal, its unilateral changes to these mandatory subjects of bargaining violated Section 8(a)(5) and (1), *Josten Concrete Products Co.,* 303 NLRB 74 (1991) [Unilateral wage increase violated Section 8(a)(5) and (1)]; *St. George Warehouse, Inc.,* 341 NLRB 904 (2004) enfd. 400 F 3d 294 (3d Cir. 2005) [failure to give union opportunity to bargain concerning decision to transfer unit work to temporary agency employees, violates Section 8(a)(5) and (1)].

Alleged violations not directly related to the withdrawal of recognition

Respondent by Brian Clapp violated Section 8(a) (1) in engaging in surveillance of employees' union activities and in giving them the impression that he was doing so.

Respondent, by Rock Delp, violated Section 8(a)(1) in creating the impression that George Halls' union activities were under surveillance.

In general, the Board has held that an employer unlawfully "surveils employees engaged in Section 7 activity by observing them in a way that is 'out of the ordinary' and thereby coercive*." Aladdin Gaming, LLC*, 345 NLRB 585, 586 (2005), petition for review denied, 515 F.3d 942 (9th Cir. 2008). Indicia of coerciveness include the "duration of the observation, the employer's distance from employees while observing them, and whether the employer engaged in other coercive behavior during its observation." Id. The test for whether there has been unlawful surveillance or conduct that creates the impression of surveillance is an objective one and involves a determination as to whether the employer's conduct, under the circumstances, was such that it would tend to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed under Section 7 of the Act. *Durham School Services*, 361 NLRB 407 (2014). See also *Broadway*, 267 NLRB 385, 400 (1983).

The Board has held taking photos or videos of employees' statutorily protected activities, without some legitimate justification, unlawfully creates the impression of surveillance, *F.W. Woolworth*, 310 NLRB 1197 (1993). The fundamental principles governing employer photographing or videoing of employees' protected activity are as follows:

. . .[A]n employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance. Photographing and videotaping such activity

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taint a withdrawal of recognition unless an unfair labor practice charge has been filed before the withdrawal. That is simply incorrect and is not supported by the *Quazite* decision. An unremedied unfair labor practice can taint a withdrawal regardless of whether or not a charge was filed prior to withdrawal.

clearly constitutes more than mere observation, however, because such pictorial record keeping tends to create fear among employees of future reprisals. The Board in *Woolworth* reaffirmed the principle that photographing in the mere belief that something might happen does not justify the employer's conduct to interfere with employees' right to engage in concerted activity . . .. Rather, the Board requires an employer engaging in such photographing or videotaping to demonstrate that it had a reasonable basis to have anticipated misconduct by the employees. "[T]he Board may properly require a company to provide a solid justification for its resort to anticipatory photographing . . .. The inquiry is whether the photographing or videotaping has a reasonable tendency to interfere with protected activity under the circumstances in each case." *National Steel & Shipbuilding Co.,* 324 NLRB 499 (1997), enfd. 156 F.3d 1268 (D.C. Cir. 1998).

Absent proper justification the photographing of employees engaged in protected activities violates the Act because it has a tendency to intimidate, *F.W. Woolworth Co.,* 310 NLRB 1197 (1993). The same is true if an employer merely gives employees the impression that their protected activities are under surveillance. Full-Fill has not established sufficient justification for Brian Clapp to approach the union hand billing and remain there while displaying his cellphone. Respondent has not established there in fact was a safety hazard created by the union representatives. It did not bother summoning law enforcement; it did not introduce photographs demonstrating that union hand billers created a safety hazard or establish whose complaints allegedly led Brian Clapp to go out and observe the hand billing.

Rock Delp's comments to George Halls likewise created the impression that Respondent was watching his union activities. A reasonable person would have been intimidated by such remarks.

Respondent violated Section 8(a)(1) in not providing George Halls with his Weingarten rights

Although Respondent had prepared a written discipline for George Halls before it met with him on February 20, 2020, it is clear from Lynn Mollica's testimony that a final decision to issue the discipline was not made until Respondent met with Halls and considered the written statement he authored at the meeting. Therefore, the meeting was investigative, and Halls was entitled to the union representation he requested.[22]Respondent tried to contact the Union. Although, Halls was not entitled to any particular union representative, Respondent violated Section 8(a)(1) in proceeding without any union representative, *Postal Service,* 246 NLRB 1127 (1979); *Williams Pipeline Company,* 315 NLRB 1 (1994).

Respondent violated Section 8(a)(1) by threatening to search George Halls' locker and violated Section 8(a)(3) and (1) by searching his toolbox.

As I found previously, Respondent searched George Halls' toolbox and threatened to search his locker because it suspected he had union material in both places. I also concluded that Respondent did not have any legitimate reason to perform this search. Respondent has not established that the union material would have presented any greater fire/explosion hazard in the

[22] The discipline itself is not alleged to have been violative.

gas house than the documents and other materials that it kept in the gas house. The search and the threat violated Section 8(a)(1). The search also violated Section 8(a)(3).

Respondent violated Section 8(3) and (1) in terminating Ricky Johnson and Justin Kindle and in disciplining Justin Kindle on November 15, 2019.

In order to establish a violation of Section 8(a) (3) and (1), the Board generally requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatee's protected conduct was a 'motivating factor' in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct, *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399-403 (1983); *American Gardens Management Co.*, 338 NLRB 644 (2002).

Improper employer motivation may be inferred from circumstantial as well as direct evidence. *NLRB v. Link-Belt Co.,* 311 U.S. 584, 602, 61 S.Ct. 358, 367, 85 L.Ed. 368 (1941); *Birch Run Welding,* 761 F.2d 1175 at 1179 (6th Cir. 1985). Discriminatory motivation may reasonably be inferred from a variety of factors, such as the company's expressed hostility towards unionization combined with knowledge of the employees' union activities; inconsistencies between the proffered reason for discharge and other actions of the employer; disparate treatment of certain employees compared to other employees with similar work records or offenses; a company's deviation from past practices in implementing the discharge; and proximity in time between the employees' union activities or other protected activity and their discharge. *La Gloria Oil and Gas Co.,* 337 NLRB 1120 (2002); *Metro Networks, Inc.,* 336 NLRB 63 (2001). A discharge following closely on the heels of protected activity is particularly powerful evidence of discrimination, *Jim Causley Pontiac v. NLRB,* 620 F.2d 122, 126 (6th Cir.1980).

Generally, to establish illegal motive the General Counsel must show that the discriminatee engaged in union or other protected activity, that the Respondent knew of that activity, and bore animus towards that activity sufficient to draw an inference that the employer was motivated by the protected conduct to take the adverse action against the employee. In *Tschiggfrie Properties*, 368 NLRB No. 120, slip op. at 1 (2019), the Board held that "to meet the General Counsel's initial burden [under *Wright Line*], the evidence of animus must support a finding that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee." [23]

In the case of Ricky Johnson, his termination followed soon after Respondent became aware of his support for the Union. Respondent did not contradict Johnson's testimony that he took a union flyer while leaving Respondent's facility in the presence of Brian Clapp shortly before he was fired.

[23] I am well aware that Board precedent has gone back and forth as to whether the General Counsel's initial burden includes demonstrating a causal relationship between the protected activity and the adverse action. Regardless, the outcome of this case does not depend on whether there are 4 elements to the General Counsel's initial burden or 3.

That is also true of Justin Kindle. His write-up for not wearing safety glasses followed almost immediately the Union advising Respondent that Kindle was an in-house organizer. Although his termination occurred 3 ½ weeks later, it was predicated according to Respondent in part on the November 15 write-up. The timing of the terminations and the write-up are sufficient to satisfy the General Counsel's burden of making an initial showing. Justin Kindle was far from a model employee. However, to meet its burden, Respondent must show that it would have written up Kindle on November 15 and terminated him on December 10 in the absence of his recent union activities. It has not done so.

An employer's imposition of discipline violates the Act if it relies on prior discipline that violated the Act and fails to show it would have issued the same discipline even without reliance on the prior unlawful discipline, *Southern Bakeries, LLC,* 366 NLRB No. 78 (2018); *Dynamics Corp.,* 296 NLRB 1252, 252-1255 (1989) enfd. 928 F. 2d 609 (2d Cir. 1991); *The Celotex Corporation,* 259 NLRB 1186, 1186 fn. 2, 1190-1193 (1982). The Board has long held that employers should not be "permitted to take advantage of their unlawful actions, even if employees may have engaged in conduct that -in other circumstances-might justify discipline," *Postal Service,* 367 NLRB No. 142 (June 4, 2019). Establishing that it may have had grounds to terminate Kindle on other occasions is insufficient to overcome the General Counsel's initial showing. Moreover, Respondent has not established that it would have discharged Kindle in December had it not illegally written him up in November 2019.

Respondent failed to meet its burden because the record shows that it had no objective standards for when to discipline or terminate an employee. Both Johnson and Kindle had committed the offenses for which they were disciplined and terminated before. Respondent has failed to satisfactorily explain why conduct which had not been worthy of termination previously became worthy of termination soon after Full-Fill became aware of Johnson and Kindle's union activities. Thus, the initial showing of discrimination has not been overcome and I find that both terminations and the November 15, 2020 write-up for Kindle violated Section 8(a)(3) and (1).

CONCLUSIONS OF LAW

1. Respondent by Brian Clapp violated Section 8(a)(1) by engaging in surveillance of employees engaged in union activities and in creating the impression that employees were under surveillance.

2. Respondent by Brian Clapp and Richard Simpson violated Section 8(a)(1) by threatening to search George Halls' locker and 8(a)(3) and (1) by searching his toolbox.

3. Respondent violated the Act by continuing its investigative interview of George Halls without a union representative present, as requested by Halls.

4. Respondent, by Rock Delp, created the impression that George Halls' union activities were under surveillance and violated Section 8(a)(1) in doing so.

5. Respondent, by Karen Miller, violated Section 8(a)(1) by informing or suggesting to employees that they would not get their annual XMAS/end-of-year bonuses due to the Union.

6. Respondent, by Nancy Jones, violated Section 8(a)(1) on several occasions by telling employees, and/or suggesting to them, that they would not receive their XMAS/end-of-year bonus due to the Union.

7. Respondent violated Section 8(a)(3) and (1) by discharging Rick Johnson and Justin Kindle.

8. Respondent violated Section 8(a)(3) and (1) by writing Justin Kindle up for failing to wear his safety glasses properly immediately after the Union informed it of his support for the Union.

9. Respondent violated Sections 8(a)(5), 8(a)(3) and 8(a)(1) by delaying payment of its annual XMAS/end-of-year bonus in 2020.

10. Respondent violated Section 8(a)(5) and 8(a)(1) by withdrawing recognition of the Union in December 2020.

11. Respondent has violated Section 8(a)(5) and (1) during 2021 by unilaterally and significantly increasing the number of temporary employees doing bargaining unit work.

12. Respondent violated Section 8(a)(5) and (1) by unilaterally offering employees an extra $1 per hour if they carpooled.

REMEDY

I recommend that Respondent be ordered to recognize and on request bargain with the Union as the exclusive collective-bargaining representative of Respondent's bargaining unit employees for a period of not less than 6 months. If an understanding is reached, Respondent must sign an agreement concerning the terms and conditions of employment. I recommend a bargaining order because it is necessary to fully remedy the violations in this case for the following reasons:

(1) To vindicate the Section 7 rights of a majority of unit employees who have been denied the benefits of collective bargaining since December 31, 2020, it is only by restoring the status quo and requiring the Respondent to bargain with the Union for a reasonable period of time that the employees will be able to fairly assess the effectiveness of the Union in an atmosphere free of the Respondent's unlawful conduct.

(2) An affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. It removes the Respondent's incentives to delay bargaining in the hope of further discouraging support for the Union. It also ensures that the Union will not be pressured by the possibility of a decertification petition or by the prospect of imminent withdrawal of recognition to achieve immediate results at the bargaining table

following the Board's resolution of its unfair labor practice charges and the issuance of a bargaining order.

(3) A cease-and-desist order without a temporary decertification bar would be inadequate to remedy Respondent's withdrawal of recognition and refusal to bargain. It would permit another challenge to the Union's majority status before the taint of Respondent's previous unlawful withdrawal of recognition has dissipated. Allowing another challenge to the Union's majority status without a reasonable period for bargaining would be unjust also because the Union needs to re-establish its relationship with unit employees, who have already been without the benefits of union representation for over a year. Permitting another decertification petition may likely allow Respondent to profit from its unlawful conduct.

These aforesaid circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of unit employees who continue to oppose union representation.

The Respondent, having discriminatorily discharged Rick Johnson and Justin Kindle must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010). Respondent shall compensate them for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings, computed as described above.

Respondent shall file a report with the Regional Director for Region 25 allocating backpay to the appropriate calendar quarters. Respondent shall also compensate Rick Johnson and Justin Kindle for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *AdvoServ of New Jersey,* 363 NLRB No. 143 (2016).

Respondent shall also return its Henning, Illinois facility to the status quo ante as of December 31, 2020. The determination as to the proportion of direct hires to temporary agency employees is to be determined in the compliance stage of this proceeding. *St George Warehouse, Inc.* 341 NLRB 904 at 909.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[24]

ORDER

Respondent, Full-Fill, Industries, LLC., Henning Illinois, is hereby ordered to

1. Cease and desist from:

[24] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Withdrawing recognition from IBEW Local 538 and failing and refusing to bargain with the Union as the collective bargaining representative of its bargaining unit employees.

(b) Changing wages, benefits or other terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

(c) Discharging or otherwise discriminating against any employee for engaging in union or other protected concerted activity.

(d) Engaging in surveillance of employees' union activities and/or creating the impression that it is doing so.

(e) Threatening employees due to their support for the Union.

(f) Withholding or delaying benefits from employees that have become established practices.

(g) Telling or suggesting to employees that benefits are being withheld because of the Union.

(h) Materially and unilaterally increasing the number of temporary employees performing bargaining unit work.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

(j) Continuing an investigative interview concerning employee misconduct in the absence of a union representative if a represented employee requests such representation.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of its full-time and regular part-time production and compounding employees, forklift operators, maintenance employees, laboratory technicians, gas house operator, quality assurance, sanitation/janitorial employees and warehouse employees concerning terms and conditions of employment for a period of not less than 6 months, and, if an understanding is reached, embody the understanding in a signed agreement.

(b) On request by the Union, rescind any changes in its unit employees' terms and conditions of employment that were unilaterally implemented since December 31, 2020.

(c) Within 14 days from the date of the Board's Order, offer Rick Johnson and Jason Kindle full reinstatement to their former jobs or, if those jobs no longer exist, to

substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make Rick Johnson and Justin Kindle whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(e) Compensate Rick Johnson and Justin Kindle for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(f) Compensate Rick Johnson and Justin Kindle for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings.

(g) Within 14 days from the date of the Board's Order, remove from its files any reference to the discharges of Rick Johnson and Jason Kindle, and Jason Kindle's November 15, 2019 write-up and within 3 days thereafter notify Rick Johnson and Justin Kindle in writing that this has been done and that the discharges and Kindle's November 15, 2019 write-up, and any reference to them will not be used against them in any way.

(h) Within 14 days after service by the Region, post at its Henning, Illinois facility copies of the attached notice marked "Appendix."25 Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 31, 2020.

25 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(i) Pay to any employee or former employee, who was in a classification that received a bonus or gift card prior to 2020 and did not receive a bonus or gift card in 2020, their 2020 bonus or the value of the gift card.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: Washington, D.C. January 24, 2022

Arthur J. Amchan
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT withdraw recognition from International Brotherhood of Electrical Workers (IBEW) Local Union 538, and fail and refuse to recognize and bargain with IBEW Local 538 as the exclusive collective bargaining representative of our full-time and regular part-time production and compounding employees, forklift operators, maintenance employees, laboratory technicians, gas house operator, quality assurance, sanitation/janitorial employees, and warehouse employees

WE WILL NOT change your wages, benefits, or other terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT materially increase the number of temporary employees doing bargaining unit work without notifying the Union and giving it an opportunity to bargain.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in union or other protected concerted activity.

WE WILL NOT threaten you on account of your support for the Union.

WE WILL NOT proceed with an investigative interview about alleged misconduct without a union representative present if you have requested such representation.

WE WILL NOT engage in surveillance of your union or other protected activities and WILL NOT create the impression that we are doing so.

WE WILL NOT tell you or give you the impression that benefits that are established past practices, such as your XMAS/end-of-year bonus, will not be given to you on account of the Union.

WE WILL NOT DELAY payment of a bonus or other benefit to undermine support for IBEW Local 538 or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain for a period of not less than 6 months with, IBEW Local 538 as the exclusive collective bargaining representative of our full-time and regular part-time production and compounding employees, forklift operators, maintenance employees, laboratory technicians, gas house operator, quality assurance, sanitation/janitorial employees and warehouse employees and if an understanding is reached, embody the understanding in a signed agreement.

WE WILL, upon the Union's request, rescind the changes in the terms and conditions of employment that were unilaterally implemented since December 31, 2020.

WE WILL, within 14 days from the date of this Order, offer Rick Johnson and Justin Kindle full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Rick Johnson and Justin Kindle whole for any loss of earnings and other benefits resulting from their terminations, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Rick Johnson and Justin Kindle for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Regional Director for Region 25 allocating the backpay award to the appropriate calendar quarters.

WE WILL compensate Rick Johnson and Justin Kindle for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges/terminations of Rick Johnson and Justin Kindle and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges/terminations will not be used against then in any way. We will also do this with regard to Justin Kindle's November 15, 2019 disciplinary write-up.

FULL-FILL INDUSTRIES, LLC

(Employer)

Dated _____

_____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation, and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

575 North Pennsylvania Street, Room 238, Indianapolis, IN 46204-1577
(317) 226-7381, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/25-CA-249830 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (317) 226-7413.